

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

RATE AND SERVICE CHANGES TO IMPLEMENT  
FUNCTIONALLY EQUIVALENT NEGOTIATED  
SERVICE AGREEMENT WITH BANK ONE  
CORPORATION

Docket No. MC2004-3

UNITED STATES POSTAL SERVICE COMMENTS ON  
RECONSIDERATION IN RESPONSE TO ORDER NO. 1450  
(January 25, 2006)

On January 11, 2006, the Commission issued an Order Denying Petition of J.P. Morgan Chase & Co. to Reopen the Record, Order No. 1450. The Commission now seeks comments on the reconsideration of its recommended decision and opinion on the Bank One NSA, which will be based on the existing record. The Postal Service provides its comments as follows:

Pursuant to 39 U.S.C. § 3625(c)(2), the Governors sent the Bank One Recommended Decision and Opinion back to the Postal Rate Commission for reconsideration.<sup>1</sup> The core of Governors' decision to pursue this statutory option is their belief that the Commission should re-evaluate the need for a cost-savings cap on Bank One's volume-related discounts in light of the Governors' views. Governors' Decision at 8. The Governors requested that the Commission consider the Governors' concerns on the level of financial and other risk that can be tolerated. *Id.* Specifically, the Governors asked that the Commission

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<sup>1</sup> Decision Of The Governors Of The United States Postal Service On The Opinion And Recommended Decision Of The Postal Rate Commission Approving Negotiated Service Agreement With Bank One Corporation, Docket No. Mc2004-3, February 16, 2005. (Governors' Decision)

reconsider, clarify, and elaborate upon a) the evidentiary requirements necessary to support volume discounts in the Bank One case, and b) whether the Commission's policy for recommending NSAs will be based on the need to eliminate risk entirely, or on some other standard. *Id.* at 9. The Governors also expressed concern about the role functional equivalency may have played in the Commission's decision to impose a cap and the Commission's views on settlement. *Id.* at 4, fn. 7 and at 9. The Governors specifically asked that these issues be addressed in the context of the evidentiary record in Bank One. *Id.* at 9-10.

The Governors' preference for addressing the broader implications of the Commission's pronouncements in the Bank One decision, as well as the Governors' request that the Commission clarify the actual principles and thinking upon which its recommendations are founded, are both appropriate and pragmatic. The Commission's conclusions in the Recommended Decision must have been based on its application of a deliberate and thoughtful standard that it applied to the facts on the Bank One record. Accepted principles of administrative law demand, at a minimum, that the regulatory decision-maker articulate the criteria for decision and the reasoning it applies, as well as the particular elements of the factual record that support its conclusions and those that it excluded from consideration.

Furthermore, the Governors' predilections are highly realistic in the context of the developing framework for NSAs. While the current regulatory environment might theoretically benefit from a scholarly inquiry and leisurely

debate into hypothetical situations that might ground abstract principles, that may or may not ever be applied, the fact is that the Governors perceive an impending need to promote the NSA approach now in the concrete context of the Bank One record and the Commission's Recommended Decision. *Id.* at 10. As the Governors' perceive it, the need for this immediate focus concerns the highly practical potential of NSAs as a promising approach to deter volume loss and invigorate the Postal Service's business prospects with individual mailers, for the ultimate benefit of all mailers. *Id.* at 15.

Up to now, the NSA promise has advanced through fits and starts. As the Postal Service and others have argued, the uncertainty and procedural unwieldiness that have emerged from the NSA cases so far have had the effect of chilling the prospects for new and potentially more rewarding opportunities. No doubt, promising deals have been aborted because potential NSA partners have been deterred by the lack of clarity about certain issues that has arisen from the existing precedents, particularly about the burden expected to be carried for successful pursuit of NSAs. As has been emphasized repeatedly, moreover, this uncertainty is amplified by the relatively high transaction costs and delay that have accompanied previous NSA efforts, including Bank One's patient and substantial investment in the current protracted proceeding. Finally, the Commission's inclination to restrain the potential of particular NSAs through the imposition of caps, perhaps as a result of applying a needlessly strict standard of risk avoidance, provides a very practical target for the Governors' request for

reconsideration, giving both the Postal Service and the Commission an opportunity to provide immediate impetus to the NSA approach in this case.

In this regard, the Postal Service is apprehensive that some of the Governors' objectives in this reconsideration will be needlessly sidestepped. In describing the Governors' requests, Order No. 1450, as well as Order No. 1443, emphasizes the breadth and prospective nature of the Governors' concerns, while affirming the Commission's primary focus on the narrower issue of maintaining the stop-loss cap on the Bank One NSA.<sup>2</sup> Furthermore, in both orders, the Commission expresses the intention to provide the guidance the Governors seek through a rulemaking proceeding. Order No. 1443 at 5; Order No. 1450 at 7.

Although the Governors sought an elaboration of the broad language in the Commission's Recommended Decision and Opinion and its Concurring Opinion that uncapped functionally equivalent NSAs are possible, they also sought guidance that specifically concerned the Bank One NSA. In order to give effect to the Governors' concerns, the Postal Service respectfully reemphasizes the Governors' requests that the Commission's Recommended Decision on the reconsideration extend beyond a narrow reevaluation of the factual record and include a discussion of evidentiary standards that the Commission applied in its reconsideration of the Bank One NSA. If the recommended decision contains

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<sup>2</sup> Order No. 1443 at 3-4. Both Order Nos. 1443 and 1450 characterize the Governors' goals broadly as having a prospective, abstract focus. See Order No. 1443 at 1-2; Order No. 1450 at 6.

the broad language found in the original decision and concurring opinion, then the Postal Service requests that the Commission explain its positions fully.

We note that, in a series of orders, the Commission has addressed some of the issues raised by the Governors: the role of functional equivalency in the imposition of the stop-loss cap. Order No. 1450 at 30-32; the assessment of risk, Order No. 1443 at 13-14; and the role of settlements at Order No. 1443 at 5-6. However, each of these discussions took place before the Commission's recent decision to base the reconsideration solely upon the existing record. We ask that the Commission address each of these issues as they apply to its reconsideration and reevaluation of the record.

The Postal Service maintains that a cap was not necessary particularly if one balances the risks of harm. See Initial Brief of the United States Postal Service at 8-12. Should the Commission decide that the cap must remain, we respectfully request the Commission to discuss the following:

- 1) The standard of risk that the Commission applied in the reconsideration of this matter. How was it applied? See Governors' Decision at 14-16
- 2) In assessing the risk, what role did the company's forecasts, including the testimony of witness Buc, play? See Governors' Decision at 13. In its recommended decision, the Commission stated an apparent willingness to accept a forecast based on "an analysis of the sensitivity of the forecast to changes in exogenous factors." PRC

Op. MC2004-3 at 67. How should that analysis have been accomplished in the Bank One case? Governors' Decision at 13.

- 3) In its assessment of risk, what role did the risk of harm to contribution growth of a capped NSA play? What evidence should have been provided to substantiate that risk? See *id.* at 14, fn 26 and at 15. The Commission has acknowledged that a cap can choke off the Postal Service's opportunity to earn additional contribution but, in Order No. 1450, it stated that it cannot balance the relative harms unless they can be quantified. Order No. 1450 at 22-23. If this continues to be the Commissions' position in the recommended decision on the reconsideration, then how should the potential harm of a stop loss cap have been quantified?
- 4) What role, if any, does functional equivalency play in the determination to impose a cap in the Bank One case? See Governor's Decision at 4, fn. 7.
- 5) What impact if any, did the settlement have on the reconsideration of the imposition of the cap? See *id.* at 16-17. What more should have been included in the record to support the settlement?

With respect to Order No. 1450, the Postal Service respectfully disagrees with the Commission's decision not to reopen the record for several reasons. First, it was based, in large part, upon the faulty assumption that because Bank One's current volumes are in excess of witness Rappaport's estimates, those

forecast are obviously inaccurate (Order No. 1450 at 13, 37) and unreliable (*id.* at 16) and might be based on effects of rebranding the Bank One credit card, merger, and exogenous factors. See Order No. 1450 at 18. The Commission need not use conjecture and suppositions in an attempt to explain the volume growth. It need only look to the existing record: the testimony of witness Buc fully supports these volumes. See Testimony of Larry Buc, BOC-T-2. Moreover, as the NSA proponents repeatedly emphasized, those estimates were conservative. See, e.g., Docket No. MC2004-3, Tr. 2/196; Initial Brief of the United States Postal Service at 9. Upon reconsideration, we ask the Commission to reevaluate and consider the issue in light of all of the after rates volume forecast evidence in the record.

Second, we supported reopening the record as a means to address the current confusion about the sufficiency of evidence in the Bank One case. The parties to the NSA went to extraordinary lengths to address the Commission's expressed concerns about the risk of "anyhow" volumes by including risk mitigation terms not found in the Capital One case and providing extensive analysis in response to robust discovery. The parties believed that the record contained the necessary evidence to appropriately address the risk and sustain the settlement. Other stakeholders shared this belief, as evidenced by their support of the settlement. The Commission's recommended decision made clear that this diverse group of stakeholders got it wrong. A Commission consideration and evaluation of the proffered Plunkett declaration and its underlying analyses would have answered a key question—is witness Plunkett's analysis sufficient to

support the NSA? The reconsideration can, and we believe should, still address the issue of how any errors in the volume forecast analysis could have been remedied, but the task is made more difficult when discussing the issue in the abstract.

### **CONCLUSION**

For the reasons stated above and in the Governors' Decision, the Postal Service respectfully requests the Commission to approve the rates and changes without the addition of a cap on discounts and, if not, to provide the guidance sought by the Governors.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

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